Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rules	)	GN Docket No. 90-314

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its
Telephone and Wireless Companies

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THEIR ATTORNEY

April 15, 1996

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SUMMARY

GTE takes no position on whether the Commission should give race- and/or gender-based bidding preferences to F block PCS auction bidders, however, GTE urges the Commission to act quickly to resolve this issue to prevent delay of the D, E, and F block auctions.

GTE believes that the Commission should amend its PCS rules to expand its definition of rural telephone company to match the definition enacted by Congress in the Telecommunications Act of 1996. GTE contends that Congress intended the new definition to apply to all sections of the Communications Act. Expanding the definition of rural telephone company would also bring significant benefits to rural telecommunications users.

GTE believes, further, that the Commission should eliminate its 35 MHz limitation on aggregated cellular and PCS spectrum and the 40 MHz PCS spectrum cap on a prospective basis. There is no evidence to suggest that, free of these limitations, cellular providers would acquire PCS spectrum in order to engage in anticompetitive behavior. Should some spectrum cap be retained, however, GTE believes that the 45 MHz CMRS spectrum cap is adequate to ensure diversity of ownership.

GTE also supports replacing the 20 percent attribution rule on a prospective basis with a controlling interest test. GTE contends that no bright line test can adequately measure whether an entity with a minority ownership interest has control over the entity's business decisions.

Finally, GTE supports the Commission's proposal to conduct the D, E, and F block PCS auctions concurrently, but urges the Commission to conduct the D and E block auction separate from the F block auction.

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COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation, on behalf of its telephone and wireless companies ("GTE") hereby files its comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* in the above-captioned proceedings.[1] In the *NPRM,* the Commission seeks comment on a number of issues pertaining to competitive bidding and ownership rules for the D, E, and F frequency blocks of the personal communications services ("PCS") in the 2 GHz band. Of particular interest to GTE, the Commission seeks comment on whether it should retain or modify its cellular/PCS cross-ownership rules and its attribution rules for cellular licensees interested in acquiring broadband PCS licenses. In addition, the Commission

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[1] Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314, *Notice of Proposed Rulemaking,* (released March 20, 1996)("*NPRM*").

seeks comment on the timing of the D, E, and F block auctions and asks whether its definition of rural telephone company should be changed to conform with the definition enacted by Congress in the Telecommunications Act of 1996.[2]

I. DISCUSSION

A. Issues Relating to the F Block PCS Auction

A great deal of the *NPRM* is devoted to discussing the Commission's race- and gender-specific rules applicable to the F block auction.[3] GTE takes no position regarding whether or not the Commission may lawfully adopt race- and/or gender-based bidding preferences. There are, however, two issues raised in this section of the *NPRM* that GTE believes merit comment.

1. The Commission Should Not Delay the D, E, and F Block Auctions

The Commission tentatively concludes that the present record in support of its race-based F block rule provisions is insufficient to satisfy strict scrutiny.[4] Likewise, the Commission tentatively concludes that the record supporting its gender-based rule provisions may be insufficient to satisfy intermediate scrutiny.[5] In order to award the D, E, and F block licenses quickly, the Commission tentatively concludes that if it is unable to gather sufficient evidence in the instant proceeding to support race- and gender-based rule provisions, it should

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[2] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[3] *NPRM* at 7-28.

[4] *Id.* at 12 (¶ 21).

[5] *Id.* at 12 (¶ 23).

eliminate those provisions and proceed as expeditiously as possible with the auctions.[6]

While GTE takes no position as to whether race- and gender-based rule provisions should be retained, GTE supports the Commission's proposal to act quickly and decisively to ensure a timely auction of the remaining broadband PCS licenses. As in the past, the race- and gender-based preference issue has the potential not only to delay the scheduling of the D, E, and F block auction, but also to delay the start of the auction to allow for court review of any Commission action.

2. The Commission Should Amend its Definition of Rural Telephone Company to Conform with the Definition Set Forth in the 1996 Act

Rural telephone companies are eligible for partitioned broadband PCS licenses pursuant to Section 24.714 of the Commission's Rules.[7] The Commission currently defines rural telephone company as "a local exchange carrier having 100,000 or fewer access lines, including all affiliates."[8] The *NPRM* notes that the 1996 Act creates a statutory definition for rural telephone companies. The statutory definition expands the number of entities that would likely qualify as rural telephone companies.[9] As such, in the *NPRM*, the

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[6] *Id.* at 13 (¶ 26).

[7] 47 C.F.R. § 24.714. Rural telephone companies also qualify for more lenient treatment under the Commission's attribution rules. 47 C.F.R. § 24.204)(d)(2)(iii).

[8] 47 C.F.R. § 24.720(e).

[9] The 1996 Act defines a rural telephone company as a "local exchange operating entity to the extent that such entity -

Commission seeks comment on (1) whether Congress intended the new rural telephone company definition to apply to Section 309(j) or only to the new statutory sections; and (2) whether the Commission should, in any event, change its current definition to reflect the new statutory language.[10]

Consistent with its position taken previously in Docket 93-253, GTE believes the Commission should change its definition of rural telephone company to comply with the new statutory definition.[11] Congress elected to place the statutory definition of rural telephone company in existing Section 3 of the Communications Act.[12] The Section 3 definitions apply "for the purposes of this

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"(A) provides common carrier service to any local exchange carrier study area that does not include either --

"(i) any incorporated place of more 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

"(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

"(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

"(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

"(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996."

1996 Act at Section 3(a)(47).

10 *NPRM* at 24 (¶ 52).

11 Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, GTE Comments (filed November 10, 1993) at 13. GTE argued, *inter alia*, that rural telephone company should be defined as local exchange service providers serving an area having no incorporated place of 10,000 or more inhabitants and no territory included within a Census Bureau defined "urbanized area."

12 47 U.S.C. § 153

Act, unless the context otherwise requires." Thus, the definition of rural telephone company applies to all provisions of the Communications Act, unless otherwise provided in or required by the context of a particular section.

Section 309(j)(3)(B) of the Act requires that the Commission design its competitive bidding rules, *inter alia*, to promote dissemination of licenses to certain entities, including rural telephone companies.[13] Nowhere in that section is there any language stating or implying how the term "rural telephone company" should be defined. Likewise, nowhere in the 1996 Act, or in any explanatory text, is there any indication that the definition of rural telephone company is intended to apply only to a particular section or sections. Indeed, had Congress intended to limit its application Congress would have placed the rural telephone company definition in the particular section to which it was meant to apply.[14] Absent any indication in either the Communications Act of 1934 or the Telecommunications Act of 1996 that "rural telephone company" should have a different meaning in the context of Section 309(j), the Commission should amend its rules to comply with the 1996 Act definition

GTE believes that expanding the definition of rural telephone company would be a wise policy choice. Expanding the definition of rural telephone company would increase the number of entities eligible for license partitioning

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[13] 47 U.S.C. § 309(j)(3)(B)

[14] *See, e.g.*, 1996 Act at Section 704 (adopting three new definitions but stating that the definitions apply "for the purposes of this paragraph")

under Section 24.714 of the Commission's Rules. Telecommunications users in rural areas would benefit because such a rule change would improve the likelihood that rural portions of an MTA or BTA license will be built quickly. As such, this rule change would likely bring advanced telecommunications services to rural areas, consistent with Section 254(b)(3) of the 1996 Act.[15] In addition, greater eligibility under the partitioning rules will have a positive effect on the value of broadband PCS licenses by increasing the number of entities that would be deemed qualified to acquire a portion of an MTA or BTA broadband license.

B. Sixth Circuit Remand Issues

1. The Commission Should Eliminate its 35 MHz Limitation on Aggregated Cellular and PCS Spectrum and the 40 MHz PCS Spectrum Cap on a Prospective Basis

Section 24.204(a) of the Commission's Rules provides that no cellular licensee may be granted a license for more than 10 MHz of broadband PCS spectrum prior to the year 2000 if the grant will result in a significant overlap of the cellular licensee's Cellular Geographic Service Area ("CGSA") and the PCS service area. After the year 2000, cellular licensees will be allowed to obtain a grant of 15 MHz of PCS spectrum in an area that overlaps significantly with their

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[15] For example, suppose two rural area are served by a "stand-alone" telephone company and an affiliate of a larger telephone company respectively. Under the current rule, the area served by the affiliate would not be able to be partitioned and would not likely be built-out until after urban areas are developed. The area served by the stand-alone company, however, might be developed more quickly via geographic partitioning.

CGSA.[16] The FCC also limits all PCS licensees to a total of 40 MHz of spectrum in any one license area.[17]

On November 9, 1995, the Sixth Circuit Court of Appeals decided *Cincinnati Bell v. FCC*.[18] The Court held that the cellular/PCS cross-ownership rules are arbitrary and supported by little or no factual evidence that cellular providers would engage in anticompetitive behavior if allowed to acquire PCS licenses on an unrestricted basis. The Court also found that the Commission failed to respond adequately to arguments that the high cost associated with obtaining a PCS license and meeting the strict build-out requirements would prevent cellular carriers from acquiring PCS licenses for the purpose of preventing competitive entry by others.[19]

In response to the Court's action, the Commission now asks whether there is any reason to continue the 35 MHz limitation on aggregated cellular and PCS spectrum and the 40 MHz PCS spectrum cap. The Commission also seeks comment on whether it should replace these rules with the 45 MHz commercial mobile radio service ("CMRS") spectrum cap.[20]

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[16] 47 C.F.R. § 24.204(b).

[17] 47 C.F.R. § 24.229(c).

[18] 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*").

[19] *Id.* at 763.

[20] *NPRM* at 29-30 (¶ 66).

GTE has long opposed CMRS spectrum aggregation limits. GTE has argued that FCC policies should encourage cellular carrier participation in PCS within their service areas as well as outside their existing markets. GTE has argued that spectrum caps unduly restrain the legitimate business activities of licensees and that there is no evidence to support a finding that aggregation limits are necessary.[21]

Consistent with its previous position, GTE believes that there is no evidence to support a finding that cellular carriers will behave in an anticompetitive manner if allowed to acquire PCS spectrum on an unrestricted basis. In the *Cincinnati Bell* appeal, Radiofone argued that

> given the fact that a business must spend, in some cases, hundreds of millions of dollars to obtain a Personal Communications Service license, and then must commit itself to a mandatory build-out schedule that is likely to cost several more millions, the assumption the Cellular providers will then engage in anticompetitive behavior "defies logic."[22]

GTE agrees that the cost of acquiring licenses and constructing facilities will adequately deter cellular companies from acquiring such licenses for the purpose of preventing competitive entry into their markets. Accordingly, GTE believes that any cross-ownership restriction or spectrum cap chosen by the Commission will be arbitrary and that the Commission should eliminate these rules altogether. Should the Commission decide, however, that some spectrum

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[21] Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, CC Docket 93-252, GTE Comments (filed June 20, 1994) at 17-23; GTE Reply Comments (filed August 9, 1994) at 2-5.

cap is needed, GTE believes that retention of the 45 MHz broadband CMRS cap[23] would be sufficient to ensure diversity of ownership in each market.

GTE also strongly urges the Commission to apply any cross-ownership or spectrum cap rule changes on a prospective basis only. As GTE previously commented in GN Docket 90-314, retroactive application of any rule changes resulting from *Cincinnati Bell* would be harmful to PCS licensees, would not serve the public interest, and would be contrary to federal law.[24] Retroactive application of any cross-ownership or spectrum cap rule change would likely lead to litigation seeking to undo the already completed broadband PCS licenses.[25] PCS licensees have already incurred enormous expenses to design their systems, relocate incumbent users of the spectrum, acquire cell sites, hire staff, establish marketing plans, and test and purchase equipment. The Commission should make clear that re-auctioning the A and B spectrum blocks is not an option so that existing licensees can continue to prepare to roll-out new services without any lingering doubts about their licenses.

Retroactive application of any cross-ownership or spectrum cap rule change is not necessary to protect the public interest. As an initial matter, GTE

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22 *Cincinnati Bell* at 763.

23 47 C.F.R. § 20.6(a).

24 Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, RM-7140, RM-7175, RM-7618, Opposition of GTE Mobilnet Incorporated (filed December 15, 1995) ("GTE Opposition").

25 *See, e.g.*, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, Cincinnati Bell Telephone Petition to Implement Mandate of United States Court of Appeals for the Sixth Circuit ("CBT Petition") (filed December 8, 1995).

has argued that entities prohibited from obtaining A and B block licenses by virtue of these rules could have participated in the auctions nonetheless and litigated later.[26] Any such entity, however, may still fulfill its spectrum needs through future auctions or through purchase of existing licenses. Thus, prospective application of any rule change will serve the public interest by enabling entities wishing to provide PCS services to acquire the necessary spectrum without disrupting entities already building their systems.

Finally, retroactive application of any rule change would likely be contrary to federal law. The United States Supreme Court has stated that retroactive application of administrative rules is not favored.[27] Retroactive application of rules would also likely exceed the Commission's statutory authority.[28]

2. The Commission Should Replace its 20 Percent Attribution Rule with a Controlling Interest Test

The Commission's Rules currently provide that partnership or ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable.[29]

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[26] GTE Opposition at 9. These entities also could have participated and subsequently divested themselves of their non-complying interests.

[27] *Id.* at 6, *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (secondary citations omitted).

[28] *Id.* at 6, *citing* 47 U.S.C. § 154(i).

[29] 47 C.F.R. § 24.204(d)(2)(ii).

In *Cincinnati Bell*, however, the Court held that the Commission's attribution rule is arbitrary. The Court stated that the 20 percent rule does not bear a reasonable relationship to whether a party has the ability to control the licensee.[30] The Court found that the Commission failed to state a reasoned basis for failing to adopt less restrictive measures and remanded these matters for further proceedings. In particular, the Court faulted the Commission for failing to state why an attribution rule that considered whether a party has a controlling interest in the licensee was not adopted.[31]

In the *NPRM*, the Commission seeks comment on whether its 20 percent attribution rule should be modified. The Commission asks whether a controlling interest test should be adopted or whether some bright-line test (other than the 20 percent rule) should be adopted. The Commission also asks whether its decision regarding the attribution test should depend on whether it modifies the cellular PCS cross-ownership rule.[32] Finally, the Commission proposes to apply to the F block auction, the attribution standard adopted for the C block. Under that standard, interests held by small businesses, rural telephone companies, minorities, and women would not be attributed unless they reach a threshold level of 40 percent.[33]

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30 *Cincinnati Bell*, 69 F.3d at 759-761

31 *Id.* at 761

32 *NPRM* at 32 (¶ 72)

33 *Id.* at 32 (¶ 73)

Should the Commission, as GTE requests, eliminate the cross-ownership rules and spectrum cap limits, no attribution standard would be needed for minority ownership interests. Accordingly, GTE supports elimination of this rule. Assuming, *arguendo*, the Commission retains some form of overall CMRS spectrum cap, however, GTE believes that the 20 percent attribution rule should be abandoned in favor of a controlling interest test. GTE believes that any bright-line standard will be arbitrary. In attempting to craft a bright-line attribution standard, the Commission has tried to create a readily applicable means of determining when an investor exercises control over the business affairs of an enterprise. The trouble with this approach, as the *Cincinnati Bell* Court recognized, is that a bright line does not work. Control over a company's business decisions does not necessarily coincide with the level of ownership. The only way to ensure that an investor has a controlling interest in a company is to examine the facts of each case.

GTE does not believe that the current attribution rule would be saved by eliminating its current rules in favor of the broader 45 MHz CMRS spectrum cap. The flaw with the 20 percent rule – that it bears no relationship to the ability of an entity with a minority ownership interest in a cellular licensee to obtain a PCS license and engage in anticompetitive behavior – would not be removed by modification of the spectrum cap rules. The Commission must deal with each issue separately.

Finally, for the same reasons GTE argued in opposing retroactive application of any new spectrum cap rule, any changes in the Commission's attribution rules should be on a prospective basis only.[34]

C. The Commission Should Conduct the D and E Block Auctions Concurrent With But Separate From the F Block Auction

The Commission proposes to conduct the D, E, and F block auctions concurrently in simultaneous multiple round auctions. The Commission also seeks comment on whether it should auction the D and E block licenses together in one auction and the F block licenses in a separate auction.[35]

GTE supports the Commission's proposal to auction the D, E, and F block licenses concurrently. GTE also favors conducting two separate concurrent auctions, one for the D and E block and one for the F block. Because the eligibility rules for F block licenses differs, it would make sense to conduct the auction for that block separately. Moreover, should a legal challenge arise that might delay an auction or taint its results, the licenses auctioned separately would not be affected.

II. CONCLUSION

While GTE takes no position on whether the Commission should give race- and/or gender-based bidding preferences to F block PCS auction bidders, GTE urges the Commission to act quickly to resolve this issue to prevent delay

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[34] *See*, Discussion, Section I.B.1, *supra*

[35] *NPRM* at 38 (¶¶ 85-86)

of the D, E, and F block auctions. GTE believes that the Commission should amend its PCS rules to expand its definition of rural telephone company to comply with the definition enacted by Congress in the Telecommunications Act of 1996. GTE believes, further, that the Commission should eliminate its 35 MHz limitation on aggregated cellular and PCS spectrum and the 40 MHz PCS spectrum cap on a prospective basis. Should some spectrum cap be retained, however, GTE believes that the 45 MHz CMRS spectrum cap is adequate to ensure diversity of ownership. GTE also supports replacing the 20 percent attribution rule on a prospective basis with a controlling interest test. Finally, GTE supports the Commission's proposal to conduct the D, E, and F block PCS auctions concurrently, but urges the Commission to conduct the D and E block auction separate from the F block auction.

Respectfully submitted

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on the 15th day of April, 1996 to all parties of record.

Judy R. Quinlan